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IN THE

Supreme Court of the United States

No. 393

October Term, 1969

CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

MASHETER, ETC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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JURISDICTION

Certiorari should be denied for the following reasons:

1. No federal questions were raised by a pleading, by request to charge and exceptions or by assignment of error and no federal question was timely or properly raised in the Supreme Court of Ohio so as to give this Court jurisdiction to review the judgment on writ of certiorari.

2. The decision of the Supreme Court of Ohio was based on adequate and independent non-federal grounds.

QUESTION PRESENTED

When the State of Ohio duly appropriates property and property rights of the Board of Education of the City School District of the City of Cleveland for highway purposes, is the measure of compensation to be determined under the law of Ohio?

ARGUMENT IN OPPOSITION TO THE WRIT

The Board of Education of the City School District of the City of Cleveland is an agent of the state for the purpose of carrying on the affairs of the State of Ohio, and it may be characterized as a public school agent. *Finch v. Board of Education of Toledo,* 30 Ohio St. 37 (1876). It is an arm, agency or instrumentality of the State of Ohio for

the promotion of education throughout the state by the establishment of a statewide system of common schools. *Board of Education of Cincinnati v. Volk,* 72 Ohio St. 469 (1905). It is a corporation of a public nature charged with the performance of public duties; but it is not a municipal corporation, either in whole or in part, for the usual political and governmental functions of other subdivisions of the state. *Cline v. Martin,* 94 Ohio St. 420 (1916).

Thus it is not what is known as a "person" under the provisions of the Constitution. It is purely a creature of statute and has no power except that granted by the legislature. *Lincoln Township School District v. Redfield Consolidated School District,* 226 Iowa 298 (1939).

During the reviews of the judgment in the state courts, petitioner never raised a federal question. Its position in both the Court of Appeals of Cuyahoga County, Ohio (at page 17A of Answer Brief of the City of Cleveland, Appellee) and in the Supreme Court of Ohio (at page 17 of Brief of Cleveland Board of Education, Appellee) was that it was entitled to compensation under Section 19, Article I, Constitution of Ohio. This position both ignores the fundamental fact that this proceeding involves the appropriation of public property for a public purpose and fails to establish a denial of compensation therefor.

The State of Ohio exercised the sovereign power of eminent domain as delegated to the Director of Highways by the legislature. *The Bank of Toledo v. The City of Toledo and John R. Bond,* 1 Ohio St. 622, 686 (1853); *The City of Cincinnati v. The Louisville & Nashville Railroad Company,* 88 Ohio St. 283 (1913); *The Pontiac Improvement Co. v. The Board of Commissioners of The Cleveland Metropolitan Park District,* 104 Ohio St. 447 (1922). The delegation and scope of power is contained in Section 5519.01, Revised Code.

The statutory authority to appropriate public property is not subject to constitutional limitations applicable to private property under Section 19, Article I of Constitution of Ohio. Accordingly, the well established principles of law developed in the interpretation of this statute and its antecedents are applicable herein unless specifically qualified.

The law of Ohio, as set forth in the second paragraph of the syllabus of *Board of County Commissioners v. Thormyer, Acting Director of Highways,* 169 Ohio St. 291 (1959) supports the foregoing conclusion by an unqualified pronouncement of the law of Ohio as follows:

> "Since a land appropriation proceeding is essentially an appropriation of physical property and not merely the rights of persons, *the value of the property as a whole is to be determined first without regard to what may be the interests of ownership therein,* and although, after a determination of that amount, it must be apportioned among those having interests of ownership in the appropriated property, the determination of the extent of those interests of ownership is a matter of no concern to the appropriator of the property or the jury called upon to determine the amount of the award." (Emphasis added.)

The use—not the ownership—of the property is the significant factor in determining the measure of compensation for property and property rights appropriated from the petitioner. This principle is firmly established in the law of Ohio. *Sowers, Supt. v. Schaeffer,* 155 Ohio St. 454 (1951); *Board of County Commissioners v. Thormyer, Acting Director of Highways,* 169 Ohio St. 291 (1959).

Petitioner is to be treated in this proceeding in the same manner as a private litigant. *State ex rel. Board of Education of Springfield City School District v. Gibson,* 130 Ohio St. 318 (1935).

The authorities cited by petitioner do not support the proposition that any measure of compensation that denies

petitioner the cost of replacement facilities or substitution value of the property and property rights appropriated is a denial of just compensation, due process and equal protection of the laws in violation of the Fourteenth Amendment and Fifth Amendment to the Constitution of the United States. For example, the decision in *The State of Texas v. Waco Independent School District,* 364 S.W. (2d) 263 (1963), is based solely upon an interpretation of Article 6674 w-3 of the Revised Civil Statutes of Texas.

A review of the cases and the establishment of a measure of compensation in certain appropriation proceedings brought by the government of the United States under the Fifth Amendment to the Constitution of the United States would serve no useful purpose. At the same time, respondent recognizes that the Supreme Court of Ohio has stated that the intendment of Section 19, Article I, Constitution of Ohio and the Fifth Amendment of the Constitution of the United States is manifestly identical although the Fifth Amendment of the Constitution of the United States is a limitation upon the federal government. *State ex rel. The Steubenville Ice Co. v. Merrell,* 127 Ohio St. 453, at 454 (1934).

Petitioner sets forth the statutory provisions believed to confer on this Court jurisdiction to review the judgment by writ of certiorari at page three of its petition. Included without discussion are Section 5537.06 and Section 4931.08 of the Revised Code of Ohio. These statutes support the position of respondent since the legislature of Ohio has made substitute facilities or the cost of restoring certain facilities to their former state of usefulness a specific prerequisite in its delegation of the sovereign power of eminent domain where it deems necessary. The Ohio Turnpike Commission is required to provide substitute facilities under certain conditions set forth in Section 5537.06, Revised

Code. By this same token, Section 4931.08, Revised Code, limits compensation to municipal corporations in the appropriation by a telegraph company of easements over a street, alley or public way to that which is necessary to restore the pavement to its former state of usefulness. This provision does *not* apply to lands devoted to *other public uses.*

There is no such qualification of that sovereign power of eminent domain delegated to the Director of Highways by the legislature. There is no requirement that respondent furnish substitute facilities in either Title 55 of the Revised Code of Ohio, under which this action was commenced, or Title 1 of the Revised Code of Ohio—the alternative procedures available to respondent under the recently enacted uniform eminent domain act.

Section 5501.18, Revised Code, establishes the proper venue for actions brought against the respondent and is not applicable herein, and Section 3313.48, Revised Code, has not been discussed by petitioner.

Petitioner has had recourse to all applicable procedures set forth in cited Sections 5519.01, 5519.02 and 5519.03 of the Revised Code of Ohio, including the right to trial by jury and the right of appeal. It will receive compensation and damages based upon fair market value as the result of the appropriation of its property and property rights herein.

CONCLUSION

For this Court to entertain jurisdiction, it must appear that a federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment could not have been given without deciding it. *Lynch v. New York*, 293 U.S. 52 (1934).

The decisions of this Court clearly require petitioner to

demonstrate that the Supreme Court of Ohio prescribed a rule of law for the guidance of the jury that was in absolute disregard of its right to just compensation. *Chicago, Burlington & Quincy Railroad Company v. City of Chicago,* 166 U.S. 226 (1897); *James P. McGovern v. City of New York,* 229 U.S. 363 (1913); *McCoy v. Union Elevated Railroad Company,* 247 U.S. 354 (1918). Petitioner will receive the full and fair equivalent of the property and property rights appropriated; and it will receive just compensation as measured by market value. Assuming for the sake of argument that petitioner is a "person" under the due process clause of the Constitution of the United States, there is no federal question to be decided. *Chicago, Burlington & Quincy Railroad Company v. City of Chicago,* 166 U.S. 226 (1897); *McCoy v. Union Elevated Railroad Company,* 247 U.S. 354 (1918).

As the decision of the Supreme Court of Ohio is clearly consistent with the established principles of the Ohio law of eminent domain and is supported by adequate, substantial, and independent non-federal grounds, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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